

ARIZONA JUDICIAL COUNCIL

Request for Council Action

**Date Action
Requested:**

December 9, 2021

**Type of Action
Requested:**

☒ Formal Action/Request
☐ Information Only
☐ Other

Subject:

Conditions of Release
Committee Rule Petition

FROM:

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Jerry Landau, Senior Consultant

DISCUSSION:

This petition proposes changes in the Rules of Criminal Procedure that provide additional procedural due process after the initial appearance for review of conditions of release, especially bond, for defendants detained because they are unable to afford bond. It was drafted by Mr. Landau and Mr. Withey in consultation with an ad hoc committee of superior court and limited jurisdiction court judges. Mr. Withey will explain the proposed changes.

RECOMMENDED COUNCIL ACTION:

Vote to support the proposed petition which will be filed for consideration and adoption by the Court in 2022.

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of	Supreme Court No. R-22-_____
PETITION TO AMEND RULES)
5.3, 6.1, 7.3, and 7.4,)
ARIZONA RULES OF CRIMINAL)
PROCEDURE)
_____)

Pursuant to Rule 28 of the Arizona Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, respectfully requests this Court amend Rules 5.3, 6.1, 7.3, and 7.4, of the Rules of Criminal Procedure concerning pretrial release procedures as proposed in the appendices of this petition.

The rule changes proposed in this petition are primarily the work of an ad hoc committee of judges and AOC personnel formed to address issues with some of the rule changes originally proposed in petition R-21-0022 that were identified during discussion of court committees about that petition. Proposed rule changes were removed from R-21-0022 so they could be carefully reconsidered through

meetings with judges and criminal justice system stakeholders. The aim of these meetings was to identify changes in current procedural rules and practices that will enhance efficient and effective de novo reconsideration of pretrial detention due to inability to pay secured and cash bonds.

I. Purpose of the Proposed Rule Amendments.

Research shows that “detaining low-risk and moderate-risk defendants, even for a few days strongly correlates with higher rates of new criminal activity both during the pretrial period and years after case disposition; as length of pretrial detention increases up to 30 days, recidivism rates for low-risk and moderate-risk defendants also increases significantly.”¹ Unsecured bonds are equally effective as bonds secured by payment of money in incentivizing people to meet their appearance obligations.

The primary procedural rule amendments proposed by this petition provide for an earlier mandatory determination whether to amend conditions of release for persons detained on bond in misdemeanor cases and the opportunity to request such a determination in additional felony proceedings. Another key proposed amendment clarifies that when the court reexamines release conditions, the state

¹ *Justice for All: Report and Recommendation of the Task Force on Fair Justice for All* (Arizona Supreme Court, August 16, 2016) at p. 27, available at: <http://www.azcourts.gov/Portals/0/FairJusticeArizonaReport2016.pdf>

must carry its burden of proving that conditions imposed, especially money bond, are reasonably necessary to serve the primary purposes of preventing flight and protecting the community. Another proposed amendment provides for appointment of counsel for defendants held on bond at the IA to be available to advocate when warranted that it is not reasonably necessary to require a bond that prevents release of the defendant.

II. Proposed Rule Changes

a. Mandatory Review of Conditions of Release for Misdemeanors

Rule 7.4(f) currently requires review of conditions of release in misdemeanor cases ten days after the arraignment. This amounts to twenty days after the IA.² As the Arizona Fair Justice Commission determined, whether a defendant is released or detained pending determination of guilt is a critical decision for the defendant and for our society.

Even short pretrial stays of 72 hours in jail have been shown in national and a local Arizona study to increase the likelihood of recidivism. Pretrial incarceration can cause real harm, such as loss of employment, economic hardship, interruption of education or training, and impairment of health or injury because of neglected medical issues.³

For some defendants, the sudden loss of liberty that occurs with pretrial detention has a more significant impact than the sentence for the offense for which they are

² It is noted that in some cases the defendant may be arraigned at the initial appearance. Rule 4.2 (c).

³ Supra at 27

detained, especially misdemeanor defendants detained for offenses for which they will receive little or no time in jail. The process due to detainees unable to make bond is an early opportunity with assistance of counsel to fully contest whether the defendant's detention is required to serve the purposes of bail or is simply due to the defendant's indigence.

The proposed amendment to Rule 7.4(f) (Appendix A) would require the review ten days after the IA. Petitioner understands some courts have already accelerated this review to this timeframe and believes it strikes the right balance. Ten days allows time for the state to determine whether to proceed with the prosecution and develop a position on release and for defense counsel to obtain information relevant to appropriate conditions of release. It would cut in half a period of detention determined at the review not to be reasonably necessary.

b. Discretionary Review of Conditions of Release for Felonies

By virtue of rule petition R-21-0022, Rule 7.4(c) provides that, on motion of a party or on its own, the court may determine the conditions of release under the rules and statutes in the additional circumstance that "the defendant is unable to post bond due to the defendant's financial condition." Rule 7.4 does not mention when these proceedings should be held. One thought raised in the committee deliberations was adding an additional mandatory hearing. However, there was concern expressed about requiring such a hearing, that it would unnecessarily clog

the court's calendar. One way to avoid an additional hearing is to perform these reviews in conjunction with other proceedings. Rule 14.4(b) already provides that a motion concerning conditions of release may be heard at the arraignment. The proposed amendment to Rule 5.3 (Appendix B) provides that conditions of release also may be reviewed at the preliminary hearing.

c. Conditions of Release Review Proceedings

Proposed amendments to Rule 7.4(c)(1) and 7.4(f) (Appendix A) would supplement the current rule in that the court may hold oral argument or a hearing as needed to fully reexamine whether a bond and other conditions of release are reasonably necessary.

Proposed Rule 7.4(g) (Appendix A) reiterates in this context what is already stated in Rule 7.2(d) that the state has the burden of proof by a preponderance of the evidence that the conditions of release including bond are reasonably necessary to prevent flight or protect the community. This procedural direction is needed to assure the defendant receives, essentially, a *de novo* reexamination of the conditions of release imposed rather than deference to the conditions imposed at the initial appearance.

Deference to release conditions imposed at the initial appearance is inconsistent with procedural due process. Early proceedings in the criminal justice

process such as the initial appearance are necessarily less protective of the rights of the defendant – no right to appointed counsel, to confront witnesses, or to offer evidence concerning release and no burden on the state to recommend or defend the reasonable necessity of release conditions. Information concerning the risk posed by the defendant will likely be available at a review proceeding that was unavailable at the initial appearance. Additionally, the judge at the initial appearance cannot know and may not have intended that the bond set for a particular defendant would prevent release.

d. Appointment of Counsel

In response to rule petition R-21-0022 the Court recently recognized the importance of legal representation to advocate for release at the initial appearance by approving the use of legal paraprofessionals by defendants in these proceedings. Petitioner believes anyone in custody should be provided an attorney regardless of the prosecutor's or court's intention to incarcerate the defendant. The appointment of an attorney at the initial appearance for all persons detained is a key element of due process for subsequent review of conditions of release proceedings. Counsel is necessary and responsible to request review of a bond that prevents a defendant's release when warranted by the circumstances and the numerous considerations provided by rule and statute. Counsel is also needed to identify the rule and statutory considerations relevant to release to counter the state's argument for bond

that prevents release. The proposed addition of Rule 6.1(b)(1)(C) (Appendix C) calls for appointment of counsel for persons detained at the initial appearance.

e. Technical Amendments

Rule 7.3(c) is proposed (Appendix D) to be amended to change the term “reasonable and necessary” to conform to the term “reasonably necessary” used in A.R.S. §13-3967(D)(6). This conforming change was recently made in the language of Rule 7.4 as proposed in rule petition R-21-0022.

III. Distribution for Comment.

This petition was presented to the Committee on Pretrial Services, Presiding Judges, and the Leadership Conference. It was also presented for action at the Committee on Superior Court, the Committee on Limited Jurisdiction Courts, and the Arizona Judicial Council. Comments received were addressed as described above.

Wherefore, petitioner respectfully requests that the Court amend the Rules of Criminal Procedure as proposed in the appendices included herewith.

RESPECTFULLY SUBMITTED this ____ day of January, 2022.

By /S/_____

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APPENDIX A

(language to be removed is shown in ~~strike through~~, new language is underlined)

Rule 7.4. Procedure

(a) Initial Appearance. At an initial appearance, the court must determine bail eligibility and the conditions for release. If the court decides that the defendant is eligible for release, the court must issue an order containing the conditions of release. The order must inform the defendant of the conditions and possible consequences for violating a condition, and that the court may immediately issue a warrant for the defendant's arrest if there is a violation.

(b) Bail Eligibility Hearing.

(1) *Right to Secure Witnesses, Cross-Examine, and Review Witness Statements.* At a bail eligibility hearing, each party has the right to secure the attendance of witnesses, cross-examine any witness who testifies, and to review any previous written statement by the witness before cross-examination.

(2) *Victims.* Notwithstanding the time limits of Rule 39(g)(1), a victim must be afforded the rights provided in Rule 39(g).

(3) *Admissibility.* Evidence is admissible at the hearing only if it is material to whether, and under what conditions, to release the defendant on bail and whether probable cause exists to hold the defendant for trial on each charge. Rules or objections calling for the exclusion of evidence are inapplicable at a bail eligibility hearing.

(c) Later Review of Conditions.

(1) *Generally.* On motion or on its own, a court may reexamine bail eligibility or the conditions of release if the case is transferred to a different court, if a motion alleges the existence of material facts not previously presented to the court or, if

not previously raised under this provision, the defendant is unable to post bond due to the defendant's financial condition. The court may hold oral argument or an evidentiary hearing.

(2) *Motion Requirements and Hearing.* The court may modify the conditions of release only after giving the parties an opportunity to respond to the proposed modification. A motion to reexamine the conditions of release must comply with victims' rights requirements provided in Rule 39.

(3) *Eligibility for Bail.* If the motion is by the State and involves a defendant previously held eligible for bail at the initial appearance, it need not allege new material facts. The court must hold a hearing on the record as soon as practicable, but no later than 7 days after the motion's filing.

(d) Evidence. A court may base a release determination under this rule on evidence that is not admissible under the Arizona Rules of Evidence.

(e) Defendant's Bail Status. If the court makes the findings required under Rule 7.2(b)(1) or (b)(2) to deny bail, the court must order the defendant held without bail until further order. If not, the court must order the defendant released on bail under Rule 7.2(a).

(f) Review of Conditions of Release for Misdemeanors. No later than 10- days after ~~arraignment~~ the initial appearance, the court must determine whether to amend the conditions of release for any defendant held in custody on bond for a misdemeanor. The court may hold oral argument or an evidentiary hearing.

(g) Burden of Proof. The state has the burden to prove by a preponderance of the evidence that the bond is reasonably necessary under Rule 7.3(c) taking into account all of the factors provided in A.R.S. § 13-3967(B) and, if available, a recommendation of a pretrial services program that is based on an appropriate risk assessment instrument.

(g h) Appointment of Counsel. The court must appoint counsel in any case in which the defendant is eligible for the appointment of counsel under Rule 6.1(b).

APPENDIX B

(language to be removed is shown in ~~strike through~~, new language is underlined)

Rule 5.3. Nature of the Preliminary Hearing

(a) Procedure.

(1) *Permitted Evidence.* During a preliminary hearing, a magistrate may admit evidence only if it is material to whether there is probable cause to hold the defendant for trial.

(2) *Cross-Examination; Witness Statements.* All parties have the right to cross-examine a witness who testifies in person at the hearing, and to review any of the witness's previous written statements before conducting cross-examination.

(3) *Probable Cause Ruling.* At the close of the State's case, the magistrate must determine and state for the record whether the State's case establishes probable cause.

(4) *Offer of Proof.* If the magistrate rules that there is probable cause, the defendant may make a specific offer of proof to the contrary, including the identities of witnesses who would testify or produce the offered evidence. The magistrate must allow the defendant to present the offered evidence, unless the magistrate determines that, even if true, the evidence would be insufficient to rebut the probable cause finding.

(b) Unlawfully Obtained Evidence. A court must not exclude evidence during a preliminary hearing solely on the ground that it was obtained unlawfully.

(c) Review of Conditions of Release. A magistrate may, subject to Rule 39, review the conditions of release for a defendant at the preliminary hearing.

APPENDIX C

(language to be removed is shown in ~~strike through~~, new language is underlined)

Rule 6.1. Right to Counsel; Right to Appointment of an Attorney; Waiver of the Right to Counsel; Authority of a Legal Paraprofessional

(a) Right to Be Represented by Counsel. A defendant has the right to be represented by counsel in any criminal proceeding. The right to be represented by counsel includes the right to consult privately with counsel, or the counsel's agent, as soon as feasible after a defendant has been taken into custody, at reasonable times after being taken into custody, and sufficiently in advance of a proceeding to allow counsel to adequately prepare for the proceeding.

(b) Right to Appointment of an Attorney.

(1) *As of Right.* An indigent defendant is entitled to a court-appointed attorney:

(A) in any criminal proceeding that may result in punishment involving a loss of liberty; or

(B) for the limited purpose of determining release conditions at or following the initial appearance, if the defendant is detained after a misdemeanor charge is filed; or

(C) if the defendant is held on bond at the initial appearance.

(2) *Discretionary.* In any other criminal proceeding, the court may appoint an attorney for an indigent defendant if required by the interests of justice.

(c) Waiver of Right to Counsel. A defendant may waive the right to counsel if the waiver is in writing and if the court finds that the defendant's waiver is knowing, intelligent, and voluntary. After a defendant waives the right to counsel, the court may appoint advisory counsel for the defendant at any stage of the proceedings. In all further matters, the court must give advisory counsel the same notice that is given to the defendant.

(d) Unreasonable Delay in Retaining Counsel. If a defendant appears at a proceeding without counsel, the court may proceed if:

- (1) the defendant is indigent and has refused appointed counsel; or
- (2) the defendant is not indigent and has had a reasonable opportunity to obtain counsel.

(e) Withdrawal of Waiver. A defendant may withdraw a waiver of the right to counsel at any time. But the fact that counsel is later appointed or retained does not alone establish a basis for repeating any proceeding previously held or waived.

(f) Right to Be Represented by a Legal Paraprofessional. A defendant may be represented by a legal paraprofessional in criminal cases and proceedings as provided in ACJA § 7-210. This does not affect the right to appointment of an attorney under (b)(1)(B). A legal paraprofessional must be permitted to consult privately with the defendant as soon as feasible after a defendant has been taken into custody, at reasonable times after being taken into custody, and sufficiently in advance of a proceeding to allow a legal paraprofessional to adequately prepare for the proceeding. A legal paraprofessional must comply with all duties in Rule 6.3(a), (c), and (d).

(g) Definition of Indigency. For the purposes of this rule, “indigent” means a person who is not financially able to retain counsel.

APPENDIX D

(language to be removed is shown in ~~strike through~~, new language is underlined)

Rule 7.3. Conditions of Release

(a) Mandatory Conditions. Every order of release must contain the following conditions:

- (1) the defendant must appear at all court proceedings;
- (2) the defendant must not commit any criminal offense;
- (3) the defendant must not leave Arizona without the court's permission; and
- (4) if a defendant is released during an appeal after judgment and sentence, the defendant will diligently pursue the appeal.

(b) Mandatory Condition if Charged with an Offense Listed in A.R.S. § 13-610(O)(3).

(1) *Generally.* If a defendant is charged with an offense listed in A.R.S. § 13-610(O)(3) and has been summoned to appear in court, the court must order the defendant to report to the arresting law enforcement agency or its designee no later than 5 days after release, and submit a sample of buccal cells or other bodily substances for DNA testing as directed. The defendant must provide proof of compliance at the next scheduled court proceeding.

(2) *Required Notice.* The court must inform the defendant that a willful failure to comply with an order under (b)(1) will result in revocation of release.

(c) Additional Conditions. The court must order the defendant not to contact a victim if such an order is ~~reasonable and~~ reasonably necessary to protect a victim from physical harm, harassment, intimidation, or abuse. The court also may impose as a condition of release one or more of the following conditions, if the court finds the condition is ~~reasonable and~~ reasonably necessary to secure the defendant's appearance or to protect another person or the community from risk of harm by the

defendant. In making determinations under this rule, the court must consider, if provided, the results of a risk assessment approved by the Supreme Court and a law enforcement agency's lethality assessment.

(1) *Non-Monetary Conditions.* A court may impose the following non-monetary conditions:

- (A) placing the defendant in the custody of a designated person or organization that agrees to provide supervision;
- (B) restricting the defendant's travel, associations, or residence;
- (C) prohibiting the defendant from possessing any dangerous weapon;
- (D) engaging in certain described activities, or consuming intoxicating liquors or any controlled substance that is not properly prescribed;
- (E) requiring the defendant to report regularly to and remain under the supervision of an officer of the court;
- (F) returning the defendant to custody after specified hours; or
- (G) imposing any other non-monetary condition that is reasonably related to securing the defendant's appearance or protecting others or the community from risk of harm by the defendant.

(2) *Monetary Conditions.*

(A) Generally. A court's imposition of a monetary condition of release must be based on an individualized determination of the defendant's risk of non-appearance, risk of harm to others or the community, and the defendant's financial circumstances. The court may not rely on a schedule of charge-based bond amounts, and it must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the defendant is unable to pay the imposed monetary condition.

(B) Least Onerous Alternative. If the court determines a monetary condition is necessary, it must impose the least onerous type of condition in the lowest amount

necessary to secure the defendant's appearance or protect other persons or the community from risk of harm by the defendant.

(C) Types of Conditions. The types of monetary conditions a court may impose include the following:

- (i) an unsecured appearance bond;
- (ii) a deposit bond;
- (iii) another type of secured bond; and
- (iv) a cash bond.

